



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
SHERMAN MINTON INN OF COURT**

***INDIANA DEPARTMENT OF NATURAL RESOURCES v. LAKE
GEORGE COTTAGERS ASSOCIATION***

Appeal from:
Steuben Circuit Court
The Honorable Allen N. Wheat,
Judge

Oral Argument:
Wednesday, April 9, 2008
5:30—6:10 p.m.
20 minutes each side

NATURAL RESOURCES LAW

Does the State own or have some other interest in land underneath a public lake on which a dam is located such that the State is obliged to maintain and repair the dam?

Facts and Procedural History

Lake George is a public freshwater lake, part of which is located in Steuben County, Indiana. The Lake George Cottagers Association was formed in 1927 for promotion and preservation of the Lake and maintenance and preservation of the water level. In 1928, a ten-acre plot (“the Mill Pond”) was conveyed to the Association. Sometime in the 1930s, a dam was built there to control the water level and prevent flooding of a road.

The Association still has title to the real estate conveyed in 1928. But in 1947 the legislature enacted the Lake Preservation Act, which gave the State “full power and control of all of the public freshwater lakes in Indiana” and provided the State “holds and controls all public freshwater

lakes in trust for the use of all of the citizens of Indiana for recreational purposes.” Ind. Code § 14-26-2-5(d). An “owner” of a dam is “an association, . . . a trustee, the state, an agency of the state, . . . or any other person who has *a right, a title, or an interest* in or to the property upon which the structure is located.” Ind. Code § 14-27-7.5-4 (emphasis supplied). The owner of a dam is obliged to maintain and repair it. Ind. Code § 14-27-7.5-7.

The Association sought a declaratory judgment the State owns the real estate underneath the dam. The Association and the State both moved for summary judgment and the trial court granted the Association’s motion.

The State argues the judgment was wrong because:

*Indiana Department of Natural Resources v. Lake George Cottagers Association***CASE SYNOPSIS**

- 1) the State has only limited control over public freshwater lakes to regulate public access, and does not “own” the lakes; and
- 2) both the Association and the State have behaved as if the Association owned the Dam.

It notes the State once asked the Association for an easement to erect a water level monument, which easement the Association granted and has never withdrawn. In 1948, the State told the Association some improvements, including a steel control gate to replace a wooden water level control structure, should be made to the Dam. The State said it could not make the improvements because it had no money available and the work would have to be financed by the county, the Association, or interested local parties. The State said if the Association installed a control gate, the State would assume the responsibility of its operation if the Association would give it authority to do so. The State also said if funds were available in the future it would consider taking over the dam and its maintenance from the Association.

The Association notes the State replaced the wooden water level control structure with a concrete barrier in the 1970s, and the Association was not asked to pay for the work. In 1982, Steuben County decided to build a bridge over the Dam structure. It sought and was granted approval from the State. In 2006, the State notified the Association that the State’s jurisdiction over construction at and near the shoreline of public freshwater lakes, which jurisdiction had previously ended at the shoreline, now included any wall within ten

feet landward of the shoreline and any portion of a wall below the water level of a lake.

The Association also argues the trial court’s judgment rests on two alternative bases and the State has challenged only one on appeal. In its brief, the State alleged error in three trial court conclusions that suggested the State owned the Dam because it had *title* to the land underneath it. The Association argues the court also based its judgment on an alternative ground, noting the court’s conclusion that even if the Association *held title* to the lakebed, it would nonetheless conclude the State has a ‘right’ and ‘interest’ in the lakebed where the Dam is located.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County), Presiding

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was raised in Decatur County on the family farm first homesteaded by his ancestors more than 150 years ago. He was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained on the Court by election in 2000. Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. A husband and father, he earned his B.A. from the University of Indianapolis in 1978; his J.D. from Indiana University School of Law at Indianapolis in 1982; and his M.B.A. from Indiana Wesleyan University in 1999. He was elected judge of the Decatur County Court in 1991. From 1992 until his appointment to the Court of Appeals, he served as judge of the Decatur Superior Court.

During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution committee, and he served on the Judicial Ethics Committee of the Indiana Judicial Center. Judge Bailey is Past-Chair of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. His writings include, "A New Generation for Pro Bono," published in the *Indiana Lawyer* in 2006. He is also a certified civil mediator and a Master in the Indianapolis American Inn of Court.

A strong supporter of law-related education, Judge Bailey is currently a member of the Judicial Education Committee of the Judicial Conference of Indiana. He is also an adjunct professor at the University of Indianapolis and, in February of 2006, served as the Distinguished Jurist in Residence at Stetson University College of Law. In 2004, Judge Bailey and his First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings.

Judge Bailey is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach at National Institute of Trial Advocacy programs. He also currently serves as the Moderator of the Indianapolis Bar Leadership Series.

In 2007, Judge Bailey, who chairs the Court's Administration Committee, was named to another term on the Board of Managers of the Indiana Judges Association and was awarded a judicial scholarship for the two-year National Resource Judges' program, sponsored by the U.S. Department of Justice, to study ways to resolve complex cases involving intricate or novel scientific and technical evidence.

"Appeals on Wheels"

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

This is the Court of Appeals' 209th case "on the road" since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Melissa S. May (Vanderburgh County)

- Judge of the Court of Appeals since April 1998

Melissa S. May was appointed to the Court of Appeals in April of 1998 by Governor Frank O'Bannon and was retained on the Court by election in 2000. Judge May was born in Elkhart, Indiana. She graduated from Indiana University-South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, Indiana, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, and as co-chair of the Futures Taskforce. In addition, she was a member of the Board of Directors of the

Indiana Continuing Legal Education Forum from 1994-1999 and has been the co-chair of ICLEF's Indiana Trial Advocacy College from 2001-2005. She is a fellow of the Indiana Bar Foundation, as well as of the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 till December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee. In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

The 15 judges of the Indiana Court of Appeals issue more than 2,800 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Cale J. Bradford (Marion County)

- Judge of the Court of Appeals since August 2007



Cale J. Bradford was appointed to the Court of Appeals by Governor Mitch Daniels and took his seat on August 1, 2007.

Prior to his elevation to the Court of Appeals, Judge Bradford served for more than 10 years as Judge of the Marion Superior Court, seven years in the criminal division and three in the civil division. He was twice elected presiding judge by his colleagues.

During this tenure, Judge Bradford chaired the Marion County Criminal Justice Planning Council, a group of local elected and appointed officials who recommended ways to improve the county's response to criminal justice problems, including jail overcrowding, staffing, and budget issues. His efforts led to the end of 30 years of federal oversight of the Marion County Jail and to security improvements at the county's Juvenile Detention Center.

Before joining the bench, Judge Bradford served in the Marion County Prosecutor's Office for two years, overseeing a staff of more than 100 attorneys. For five years, he was an Assistant United States Attorney for the Southern District of Indiana, prosecuting major felony drug trafficking cases. He engaged in the private practice of law from 1986 to 1991, and served as both a deputy prosecutor and public defender during his career.

A native of Indianapolis, Judge Bradford received a B.A. in labor relations and personnel management from Indiana University-Bloomington in 1982 and his J.D. from Indiana University-Indianapolis in 1986. He is the Court of Appeals' liaison to the Indiana Judges Criminal Instructions Committee, which provides guidance to judges on jury instructions in criminal cases, and a former member of both the Indiana Judges Criminal Policy Committee and the Board of Directors of the Indiana State Judicial Conference. He is a Distinguished Fellow of the Indianapolis Bar Association and has taught ICLEF seminars on trial practice for more than 10 years. From 2005 to 2007, Judge Bradford hosted "Off the Bench with Judge Cale Bradford," a legal commentary program on Marion County's government access network. He also served on the Judicial Technology and Automation Committee (JTAC), helping to draft the state judiciary's policies on technology and electronic case management.

Judge Bradford is a former director of Indianapolis's John P. Craine House, a residential alternative to incarceration for women offenders with pre-school-aged children. He is a member of the Lawrence Youth Football League Advisory Board of Directors and the Lawrence Men's Soccer Booster Club. He and his wife, a full-day kindergarten teacher, have five children.

ATTORNEYS FOR THE PARTIES

For Appellant, Indiana Department of Natural Resources:

Gary Secrest

Chief Counsel to the Attorney General

Indianapolis

Gary Secrest is a 6th generation Hoosier. He received his Bachelor of Arts in History and Political Science from Butler University, and his Juris Doctorate from Indiana University School of Law – Indianapolis.

Mr. Secrest was admitted to the Indiana Bar in 1985 and began his legal career with the Office of the Indiana Attorney General. He worked in the Appeals Division as a Deputy Attorney General until 1993. In 1993, Mr. Secrest left the OAG and became the Chief Deputy for the State Treasurer.

Mr. Secrest worked as the Assistant Corporation Counsel for the City of Indianapolis immediately prior to re-joining the OAG. In 2001, he was named the Chief Counsel to the Attorney General, where he continues as an integral part of the OAG.

Thus far in his legal career, Mr. Secrest has participated in scores of oral arguments in front of the Indiana Court of Appeals, Indiana Supreme Court, and the U.S. Court of Appeals for the Seventh Circuit.



For Appellee, Lake George Cottagers Association:

Karl Mulvaney

Bingham McHale LLP

Indianapolis

Karl Mulvaney is a partner in the firm of Bingham McHale LLP in Indianapolis. He received his BS degree (*cum laude*) from The Ohio State University in 1972, and a J.D. degree (*cum laude*) from Indiana University School of Law – Indianapolis in 1977.

Mr. Mulvaney has been a contributing author and speaker at numerous programs sponsored by the Indiana Continuing Legal Education Forum (ICLEF) and other organizations. He is the author of "Fundamental Change In Indiana Appellate Procedure, Or What Happened To The Motion to Correct Error," which received the Best Article Award in 1989 from *Res Gestae*, the Indiana State Bar Association's legal chronicle.

Mr. Mulvaney practices primarily in the appellate and attorney discipline areas. He is a fellow of the American Academy of Appellate Lawyers and was formerly the Court Administrator, Assistant Administrator and law clerk at the Indiana Supreme Court from 1976 to 1991. For 11 years, from 1992 to 2003, he was chair of the Indiana Supreme Court Committee on Rules of Practice and Procedure, and from 1998 to 2001 was a member of the Indiana Judicial Qualifications Commission. He was the 44th International President of the Phi Delta Phi Legal Fraternity, served in the United States Army from 1972 to 1974, received the Army Commendation Medal, and is a Sagamore of the Wabash.